



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

SEP 2 2005

Thomas J. Piatchek, Esq.  
11648 Gravois Road  
Suite 225  
St. Louis, Missouri 63126

RE: MUR 5493

Dear Mr. Piatchek:

On September 27, 2004, the Federal Election Commission notified your client, Joan Barry in Congress and Kirk Benjamin, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, the Commission, on August 16, 2005, found that there is reason to believe your client violated 2 U.S.C. § 441d of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

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If you have any questions, please contact Kimberly D. Hart, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas  
Chairman

Enclosures  
Factual and Legal Analysis

cc: Joan Barry

[REDACTED]  
St. Louis, Missouri 63129

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**FEDERAL ELECTION COMMISSION  
FACTUAL AND LEGAL ANALYSIS**

**RESPONDENT:** Joan Barry in Congress and  
Kirk Benjamin, in his official capacity  
as treasurer

**MUR:** 5493

**I. INTRODUCTION**

This matter was generated by a complaint filed with the Federal Election Commission by Russ Carnahan for Congress. *See* 2 U.S.C. § 437g(a)(1).

**II. FACTUAL SUMMARY**

There are four communications at issue. One is a postcard mailed to Missouri's 3<sup>rd</sup> District residents on or about July 23, 2004. The postcard contains a disclaimer stating that it was paid for by [www.rustycarnahan.org](http://www.rustycarnahan.org) and was "not authorized by any candidate or candidate committee," but it does not otherwise identify the person(s) who paid for the message.<sup>1</sup> We do not know the political committee or person(s) responsible for the postcard. The complaint does not specifically allege the Committee's involvement in the creation, copying and distribution of the postcard. The second, third and fourth communications were flyers distributed by Joan Barry in Congress ("Committee") in connection with a joint press conference.<sup>2</sup> The third and fourth communications were also anonymously distributed by mail throughout the 3<sup>rd</sup> district by an unknown political committee or person(s). In addition, the third flyer was distributed by

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<sup>1</sup>This Office has attempted to access the website as well and it is no longer an active website. We have not been able to access it as an archived website to date.

<sup>2</sup> The Complainant asserts that members of the press informed it as to the manner in which the flyer was distributed.

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members of a local organization working on behalf of the Committee at a press conference in the organization's headquarters.<sup>3</sup>

### **III. ANALYSIS**

#### **A. Creation, Financing, Distribution and Mailing of Flyers**

The Federal Election Campaign Act of 1971 as amended ("Act") requires each treasurer of a political committee to file a report disclosing all receipts and expenditures for the reporting period and calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office). 2 U.S.C. § 434(b)(4). No person shall make contributions to any Federal candidate and his authorized political committee, which, in the aggregate, exceed \$2,000. 2 U.S.C. § 441a(a)(1)(A).

The Commission could not conclude definitively that a political committee was involved in the mailing of the postcard as well as the anonymous mailing of the flyers because it could have been a significant individual. However, the Committee admits, in essence, that it distributed the flyers as part of a press packet but does not address the question of whether it disbursed funds in connection with the creation and copying of the flyers. In addition, it does not substantially address the complaint allegation regarding the anonymous mailing of the flyer but merely challenges that sufficiency of the complaint's allegation on this point. Moreover, the Committee does not substantially address the complaint allegation regarding the postcard since the complaint does not allege its involvement. Pending an investigation to determine the individual(s) or political committee responsible for the creation, financing and mailing of the postcard and/or flyers, the Commission decided to take no action regarding the alleged violation of 2 U.S.C. §§ 434(b)(4) and 441a(a)(1)(A) on the part of Joan Barry in Congress and Kirk Benjamin, in his official capacity as treasurer.

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<sup>3</sup> The complaint does not reference the name of the organization at which the press conference took place.

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**B. Disclaimers**

The threshold question is whether these are the type of communications for which disclaimers are required. The Act requires that whenever a candidate or authorized political committee makes a disbursement for the purpose of financing any communication through mailing or any other type of general public political advertising, the communication must clearly state that the communication has been paid for by such authorized political committee. 2 U.S.C. § 441d(a)(1).

The postcard contained a disclaimer stating that it was paid for by www.rustycarnahan.org and not authorized by any candidate or candidate committee. Our information suggests that the unknown political committee attempted to obscure its true identity when soliciting the services of Lillard in hosting the website with a name that bore resemblance to Carnahan's name.<sup>4</sup> The unknown political committee also appears to have placed deceptive and misleading information on the postcard indicating that it was not authorized by any candidate or candidate committee. The information suggests that it was, in fact, an unknown political committee that disbursed funds in connection with the postcard. In addition, it seems likely that the unknown political committee disbursed funds in connection with the mailing of the anonymous flyers.

Based on the fact that the Committee admits distributing the flyers but does not address whether it was responsible for the creation and copying of the flyers, we can infer that it most likely disbursed funds in connection with the creation and copying of the flyers. Section 110.11 of the Commission's regulations speaks more specifically of the term "public communication" in relation to the disclaimer requirements. 11 C.F.R. § 110.11. The Commission defines a public

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<sup>4</sup> It is unclear whether the goal was to give the recipients of the postcard the impression that Carhanan himself was responsible for the postcard.

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communication as a "communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising, facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising." 11 C.F.R. § 100.26. The Explanation and Justification for 11 C.F.R. § 100.26 states that the term "mass mailing" includes "any mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30 day period". *See* 67 Fed. Reg. 49072 (July 29, 2002).

The Commission has confirmed with a Postal Service representative that bulk mailings must contain at least 500 pieces of mail in order to qualify for the bulk mail rate. There is also information to suggest that as many as 25,000 postcards were mailed. Given the fact that the postcard appears to have been mailed on or about July 23, 2004, with a bulk mail permit, it is reasonable to infer that the postcard constitutes mass mailing within the Commission's definition. It is also possible that the flyers would be considered a communication by mass mailing if we can determine how many were mailed. As noted, the Committee does not deny paying for the anonymous mailing of the flyers but merely challenges the sufficiency of the complaint's allegation.

Whether they were a "mass mailing" or not, it would appear that the three flyers would fall under the category of "general public political advertising" and therefore constitute public communications. The flyers contained information about Russell Carnahan's voting record as a State Representative and two of the three flyers made reference to his Congressional candidacy. The Commission requires that public communications for which a political committee makes a disbursement contain a disclaimer. 11 C.F.R. § 110.11(a)(1). A disclaimer must be clearly and conspicuously displayed. 2 U.S.C. § 441d(c). *See also* 11 C.F.R. § 110.11(c). It need not

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appear on the first page of a communication, assuming there is more than one page. 11 C.F.R.

§ 110.11(c)(2)(iv). If, however, a communication is included in a package of materials and would require a disclaimer if distributed separately, it must contain the required disclaimer.

11 C.F.R. §110.11(c)(2)(v). The Committee asserted that the press packet contained the necessary disclaimer on the front page and the individual flyers, provided to the Commission out of context, were not separate communications such that they required separate disclaimers.

The flyers and the other contents of the press packet should be considered separable communications, thereby requiring separate disclaimers. The Commission, in MUR 4957, dealt with the issue of separable communications in the context of solicitations by email. While the fact pattern itself is not similar, we believe that the Commission's analysis is still relevant to the present matter. MUR 4957 involved an Internet solicitation document that in hard copy was two pages in length. The first page was a contribution form from a website. The second page contained the disclaimer language. The recipient of the e-mail could not make a contribution without first viewing the second page. In order to make a contribution, the recipient was instructed to activate a link provided in the first page, which then displays the second page of the solicitation.<sup>5</sup> The Commission concluded that the e-mail should constitute one communication and any document reachable via hyperlink should constitute a separate communication since the viewers/recipients of an e-mail communication may not elect to go onto a linked website in order to obtain additional information or to make contributions, thereby underlining the separateness of the two communications.

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<sup>5</sup>In MUR 4957, the Respondent asserted that the disclaimer on the Committee website page to which readers of the e-mail communication were directed, met the requirements of the Commission's regulations, which do not require a disclaimer on each page, or the front page, of a multi-page communication.

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As for the flyers distributed at the press conference, it is not clear that the flyers were physically attached to a disclaimer contained on the press packet. Second, even if arguendo they were, the distribution was in a manner and setting that makes it likely that the disclaimer could be separated from the flyers. In fact, it appears possible that this is exactly what happened, and that the flyers were distributed by mail as well as in the press packet. Each flyer was prepared as a stand alone document. These factors underline the separateness of the three communications and the need for individual disclaimers. Accordingly, there is reason to believe that the Committee violated 2 U.S.C. § 441d(a)(1).

As for the postcard, it appears to contain disclaimer language that was misleading and untrue, thereby violating the requirements of the Act. The Commission believes that an unknown individual(s) or political committee may have been responsible for the creation and mailing of the postcard as well as the anonymous mailing of the flyer. Therefore, the Commission found reason to believe that an unknown political committee and its treasurer in his/her official capacity violated 2 U.S.C. § 441d by failing to include the proper disclaimer language on the mailed postcard and flyers for which it disbursed funds. Further, the Commission found reason that the Committee violated 2 U.S.C. § 441d by failing to include individual disclaimers on three flyers for which it disbursed funds.

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